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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1825

CITY OF WILLCOX AND
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The City of Willcox and the Arizona Electric Power Cooperative, Inc. (AEPCO) pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this proceeding on January 21, 1974.

AEPCO conditionally requests review of the issues framed by this Petition if, but only if, the Court grants any of the other petitions for certiorari directed against the decision below.

The challenged orders of the Federal Power Commission (FPC) which are the subject of this and other pending[1] petitions for certiorari review prescribe an "interim" curtailment plan to deal with an emergency situation of limited duration and were to expire, by their terms, on October 31, 1973, or earlier if the agency then prescribed a permanent curtailment plan. But on October 18, 1973, the FPC extended the operation of the interim plan for an indefinite future period pending its further action on a permanent plan. No such plan has yet been prescribed. The decision below dealt only with the interim plan.

AEPCO believes that review by this Court of the lower court's decision respecting the interim plan may not be necessary in view of the possibility that the FPC may soon issue a permanent curtailment plan. Such action would moot all pending petitions for certiorari unless the decision below is deemed applicable to the permanent plan. But, AEPCO believes that the decision of the Court below with respect to the issues framed by this petition and the other petitions for certiorari was, and should have been, made only in the context of an evidentiary record, briefs and arguments concerning the lawfulness of an interim plan and, therefore, should not be a precedent with respect to a permanent plan. For these reasons, AEPCO respectfully requests this Court to affirm *per curiam*, without oral argument, the opinion of the Court below, expressly limiting such affirmance to the decision on the interim plan in order to preserve the right of all petitioners to judicial review with respect to the same issues in the more important and far-reaching context of the permanent curtailment plan. On the other hand, if this Court grants the

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[1] Pacific Gas and Electric Company, No. 73-1776; San Diego Gas and Electric Company, No. 73-1790; and Southern California Gas Company, No. 73-1772.

petitions for certiorari, which have been filed by parties whose interests and positions are inconsistent with AEPCO's, we seek review of the issues framed by our petition in order to protect our right of judicial review with respect to both the interim and permanent curtailment plans.

OPINIONS BELOW

The opinion of the Court of Appeals, decided *sub nom. American Smelting and Refining Co., et al. v. FPC*, not yet reported, appears as Appendix A to the Petition of Pacific Gas and Electric Company (PG&E), No. 73-1776.[2] The principal order of the Federal Power Commission (FPC), Opinion No. 634 issued October 31, 1972 (Appendix C), and its order denying rehearing, Opinion No. 634-A issued December 15, 1972 (Appendix D), are reported at 48 F.P.C. 931 and 48 F.P.C. 1369, respectively.

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was entered on January 21, 1974. Timely petitions for rehearing were denied by order dated February 25, 1974 (Appendix B). This petition for certiorari is filed within 90 days of March 5, 1974, the date upon which the Court below issued its mandate. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b) (Appendix G).

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[2]References to Appendices are to those set forth in the Petition of Pacific Gas and Electric Company, upon which AEPCO relies pursuant to the consent of that party. However, Appendix H is reprinted in full.

STATUTES INVOLVED

The statutory provisions germane to the decision of this case are §§ 4, 5 and 19 of the Natural Gas Act, 15 U.S.C. §§717(c), 717(d) and 717(r) and §557 of the Administrative Procedure Act, 5 U.S.C. 557. These statutory provisions are set forth in full as Appendices E, F, G, and H, respectively.

QUESTION PRESENTED

In overriding contractual rights to gas deliveries during periods of shortage by "finding" such contracts unlawfully discriminatory, did the FPC violate §5(a) of the Natural Gas Act, requiring findings based on record evidence as a prerequisite to such action, §557(c) of the Administrative Procedure Act requiring the agency to rule on every material issue presented for decision and did the FPC deny due process of law under the Fifth Amendment, when it merely accepted the pipeline's self-serving interpretation of such contracts as exempting all California customers from curtailment until all east-of-California customers were completely curtailed without making any analysis, findings or conclusions on the issues raised by petitioners of whether such contracts provided for equal curtailment in all geographic areas served?

STATEMENT OF THE CASE

AEPCO is a rural, nonprofit electric cooperative association financed by the Rural Electrification Administration which generates and transmits electrical power sold, entirely on a firm basis, to four other REA cooperatives. It serves a widespread geographic area with an abnormally low population density and its customers are totally dependent upon it for essential electrical service.

AEPCO built and financed its plant in reliance upon its contract right to firm deliveries from Willcox of stated daily maximum quantities of gas and Willcox, in turn, has such rights under a service agreement with El Paso. These are long term contracts commencing March 31, 1970 and ending December 31, 1983. These contractual service arrangements were approved by the FPC.

This petition is directed against the FPC's action, in the challenged agency orders, in relegating all gas consumed by AEPCO to the lowest service priority during periods of curtailment by overriding its contractual and tariff rights as a firm resale customer to a priority over industrial gas consumed by interruptible resale customers and by El Paso's own direct customers. This inversion of curtailment priorities is extremely costly to AEPCO and to the ultimate consumers of the electricity it generates and transmits.[3] The Natural Gas Act does not provide any remedy in curtailment situations and rate refunds provided by that statute are neither available nor appropriate remedies. Furthermore, the FPC's action in prescribing its own curtailment plan may completely shield El Paso from damage liability.

AEPCO filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's

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[3]On a comparable thermal energy basis, measured by per million BTU, AEPCO's cost for natural gas is 39.83¢ and its cost for fuel oil is $1.14. Thus, AEPCO incurs an additional cost of 74.17¢ per Mcf of curtailed gas volumes. The data upon which these calculations are based is drawn from the evidentiary record in the extraordinary relief phase of this docket which the FPC has not certified as part of the record here. However, such evidence only became available after the close of the evidentiary record in the interim proceeding and, to the best of our knowledge, is not disputed by any party. In the 10 months from January through October, 1974, alone, AEPCO will be compelled to pay an additional $1,351,272.

action[4] under §19 of the Natural Gas Act (Act), 15 U.S.C. §717r[5], and prevailed with respect to several issues[6] although not with respect to the issue framed by this petition.

With respect to the latter issue, the FPC abrogated and nullified all existing contractual delivery rights during periods of gas shortages as between *industrial* customers on the ground that El Paso's preexisting contracts and tariff curtailment provisions "As interpreted by El Paso" provided that ". . . no curtailment would take place to California customers until all EOC service had been curtailed."[7] It was solely upon this basis that the FPC concluded that *human needs* customers east-of-California would be completely cut off before industrial customers in California were curtailed and that the contracts were patently discriminatory and violative of §4(b) of the Natural Gas Act. But the FPC unlawfully delegated to El Paso its function of interpreting that pipeline's filed contracts and tariffs and made no analysis, findings or conclusions on the crucial threshold issue of whether this was a correct interpretation of the contract provisions respecting cur-

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[4]Opinion Nos. 634 and 634-A (Appendices C and D).

[5]AEPCO's Petition was consolidated with eight others directed against different aspects of challenged agency orders.

[6]The Court of Appeals reversed the FPC and remanded its orders with respect thereto. Such actions are not encompassed within the scope of the issues framed by this Petition.

[7]Appendix C, p. 62. EOC refers to east-of-California. It is undisputed that curtailment of the California industrial load would provide enough additional gas to serve all human needs throughout the pipeline's system and eliminate any possibility of discrimination against human needs customers.

tailments. AEPCO[8] and other parties[9] argued to the FPC that both the preexisting contracts and tariffs provided for equal and simultaneous curtailment of California and east-of-California industrial loads.

AEPCO and other parties also argued this view at length at the lower court[10] which took cognizance of this dispute[11] but sustained the FPC's findings entirely in reliance upon the fact that the agency:

> ". . . found that, in the event of a gas shortage, El Paso's existing tariff provisions called for complete cut-off of all EOC customers, including residential and small commercial customers, before any service to California would be curtailed." [Slip op. 13, footnote omitted.]

However, it did not rule upon or even discuss AEPCO's arguments on the issue. Furthermore, the lower Court's opinion bases its affirmance of the FPC's finding of discrimination entirely upon its interpretation of such contracts and tariffs. Thus, the Court stated:[12]

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[8]Initial Brief, October 3, 1972, pp. 7-8; and Petition for Rehearing, Modification of Opinion No. 634, Motion for Stay, and Amended Motion for Extraordinary Relief, November 30, 1972, pp. 2-10.

[9]American Smelting and Refining Co., et al., Initial Brief, October 3, 1972, pp. 7-10; Nevada Power Company, Initial Brief, October 3, 1972, pp. 6-9; Tucson Gas and Electric Company, Initial Brief, October 3, 1972, pp. 19-20 and addendum B, pp. 1-5.

[10]AEPCO Brief in Support of Motion for Summary Reversal, pp. 17-23; and Initial Brief of American Smelting and Refining Co., et al. at 2-9.

[11]Appendix A, note 12 at page 17.

[12]Appendix A, p. 11.

"In Opinion No. 634 the Commission found that, under tariff provisions then in effect, El Paso's California customers would be protected from service curtailments until all service to EOC customers had been completely cut off. *As a result, the Commission found, human needs customers (residential and small commercial customers) in one part of the El Paso system would be subordinate to industrial customers in another part in the event of a severe gas shortage.* (Emphasis added.)

REASONS FOR GRANTING THE WRIT

This petition raises issues of first impression and nationwide scope which are of exceptional importance to the solution of the problems posed by the current shortage of natural gas in the United States. The decision of the Court of Appeals correctly recognizes that the FPC may not override an existing contract curtailment plan to substitute its own subjective notions of what constitutes an ideal curtailment plan for the arrangement voluntarily negotiated by the parties, but is required by the governing provisions of its enabling act to make express and precise findings, based on substantial evidence in the record, that such contractual provisions are contrary to the public interest because unlawfully discriminatory or preferential.[13] But, in reaching its decision, the lower Court afforded such a finding by the FPC an unlawful and unwarranted presumption of validity despite the absence of any supporting evidence, substantial or otherwise, and the agency's failure

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[13] Appendix A, p. 32, p. 17, p. 19.

to articulate any supporting reasons. If this decision is permitted to stand, and especially if it is a precedent with respect to permanent as well as interim curtailment plans, the FPC will enjoy the option of abrogating and nullifying the curtailment provisions of every contract between interstate pipelines and their customers by simply making a bare and unsupported recital of unlawfulness which, moreover, will not be subject to effective judicial review. Such a policy of limiting the scope of judicial review of curtailment plans eviscerates the lower Court's own proper conclusion that Congress did not vest the FPC with unlimited and plenary authority to substitute its own preferred curtailment plans for fair and lawful curtailment plans embodied in the contractual arrangements between pipelines and their customers and in the tariffs of such natural gas companies. The FPC has made no other findings of fact that the substitution of the challenged agency-prescribed service priorities for those embodied in the existing contracts and tariffs will better serve the public interest or indeed that they will serve the public interest as well. Petitioners therefore respectfully submit that the issue raised by this petition for certiorari review is, for these reasons, one of exceptional importance to the administration of the Act.

In any event, the FPC also violated §557(c) of the Administrative Procedure Act by failing to rule upon AEPCO's argument that if its interpretation of the contract and tariffs is correct, the simplest and least disruptive solution to the discriminatory exemption of California from curtailment was to revise the tariffs to eliminate this single unlawful feature and direct El Paso to curtail California and east-of-California customers on a basis of equality. Had this been done, curtailment of the California industrial load would have made enough peak day gas

available[14] to assure full satisfaction of all human needs residential and commercial gas requirements throughout El Paso's system. Instead, the FPC has resorted to a bootstrapping process of refusing to decide the primary and overriding issue of the curtailability of California industrial loads under the contracts and thereby unlawfully usurp jurisdiction and supersede completely such preexisting curtailment provisions in order to eliminate a non-existent discrimination. AEPCO respectfully submits that such deliberate and willful refusal to reach a decision on the merits or make any findings of fact or conclusions of law is arbitrary, capricious, unreasonable and a deprivation of due process under the Fifth Amendment to the United States Constitution. Petitioners further submit that the FPC has in these respects also violated the requirements of §557(c) of the Administrative Procedure Act that agency decisions shall rule on every material issue of fact, law or discretion presented on the record and shall state supporting reasons.

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[14]Exhibit 237, Schedule 1, pp. 13-14.

CONCLUSION

AEPCO's petition for writ of certiorari should be granted if the Court grants other pending petitions for review. In the alternative, this Court should affirm *per curiam* without oral argument and limit such affirmance to the decision with respect to the interim plan.

Respectfully submitted,

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Attorneys for Petitioners

City of Willcox and
Arizona Electric Power
Cooperative, Inc.

June, 1974

Appendix H

Administrative Procedure Act §8 (5 U.S.C. §557)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining application for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

SUPREME COURT, U. S.

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MICHAEL RODAK

Nos. 73-1772, 73-1776, 73-1790, 73-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. de C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION IN OPPOSITION

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June, 1974

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IN THE

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OCTOBER TERM, 1973

Nos. 73-1772, 73-1776, 73-1790, 73-1825

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BRIEF FOR AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A., de C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION IN OPPOSITION

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The petitions for a writ of certiorari in Nos. 73-1772, 73-1776, 73-1790 and 73-1825 were filed on May 24, 1974, May 28, 1974, May

29, 1974 and June 3, 1974 respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the National Gas Act, 15 U.S.C. § 717r(b). Because the petitions in Nos. 73-1790 and 73-1825 were not filed within the time specified in 28 U.S.C. § 2101(c), those petitions are jurisdictionaly defective.

QUESTIONS PRESENTED

1. Whether issues raised by interim curtailment orders issued by the Federal Power Commission and soon to be replaced by permanent orders are moot.

2. Whether the Federal Power Commission acted properly in prescribing a non-discriminatory interim curtailment plan to be observed by El Paso Natural Gas Company after finding that El Paso's then effective plan was discriminatory.

3. Whether the Federal Power Commission was required to issue an Environmental Impact Statement before responding to the imminent emergency on El Paso Natural Gas Company's system.

STATEMENT

El Paso Natural Gas Company is a natural gas company subject to the jurisdiction of the Federal Power Commission. El Paso's Southern Division System, which extends from Texas to the Eastern borders of California, supplies all the natural gas requirements of several distributor and direct industrial customers located in the States of Texas, New Mexico, Arizona and Nevada and a portion of the requirements of two California distributors, Pacific Gas

and Electric Company (PG&E) and Southern California Gas Company (SoCal), which in turn sell gas for residential, commercial and industrial use.

The East of California direct industrial customers include respondents American Smelting and Refining Company, Compania Minera de Cananea, S.A. de C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation (ASARCO, *et al.*), which are generally engaged in the mining and smelting of copper ores in the States of Texas, New Mexico and Arizona and in Northern Mexico. ASARCO, *et al.*, have purchased their natural gas requirements from El Paso since the 1940's pursuant to long term firm contracts requiring El Paso to deliver the smelters' natural gas requirements up to certain specified daily amounts. The operations of these companies contribute significantly to the economy of the Southwestern United States and Northern Mexico.

Pursuant to Commission Order No. 431, 36 Fed. Reg. 7505, El Paso filed in May, 1971, proposed changes in the curtailment procedures set forth in its FPC Gas Tariff. Hearings were ordered by the Commission on the proposed changes and were completed in June, 1972. In August, 1972, while the matter was being briefed to the presiding Administrative Law Judge, El Paso, anticipating a need to impose service curtailments beginning November 1, 1972, but not wanting to do so pursuant to either its existing procedures or its proposed revisions—at least before they were sanctioned by the Commission—requested the Commission to prescribe interim procedures to govern curtailments on its Southern Division System until a permanent plan was settled on.

Hearings were reconvened on the need for and the form of interim curtailment procedures. Following briefing, the Commission issued Opinion No. 634, 48 F.P.C. 931 (1972), which found, initially, that El Paso's existing procedures required that curtailments be imposed in the following order:

> "(a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G." 48 F.P.C. at 934.

The Commission concluded that this curtailed scheme [1] was unlawful and ordered El Paso, pending approval of a permanent plan, to curtail gas deliveries ratably to all its customers on the basis of the following end use priorities, with the lowest priority to be curtailed first:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feedstock and process needs.

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[1] While ASARCO, *et al.*, do not agree with the Commission's interpretation of the prior procedures, the Commission acted properly on that interpretation, and therefore the result reached was correctly affirmed by the Court of Appeals. For this reason, among others, ASARCO, *et al.*, oppose the untimely petition filed by the City of Willcox and the Arizona Electric Power Cooperative, Inc.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day, but more than 1,500 Mcf per day) where existing alternate fuel capability is present. 48 F.P.C. at 939.

After the Commission denied rehearing, 48 F.P.C. 1369, several parties initiated review proceedings in the Court of Appeals.

Although it remanded certain specific features of the interim program to the Commission, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's conclusion that El Paso's existing procedures were unlawful and upheld the Commission's authority to prescribe end use curtailment priorities to be applied ratably to all customers of the pipeline. Several petitions for rehearing were denied and petitions by PG&E, SoCal and San Diego Gas & Electric Company, a customer of SoCal (the California petitioners), and by the City of Willcox and Arizona Electric Power Cooperative, Inc. (AEPCO), followed.

ARGUMENT

A. The Petitions Raise Issues Which Will Be Mooted in the Near Future.

The petitions concern Commission orders which specifically are to remain in effect only until such time as a permanent curtailment plan is prescribed by the

Commission. On June 14, 1974, the Commission issued its Opinion No. 697, prescribing a *permanent* curtailment plan to be followed by El Paso. Pursuant to Ordering Paragraph I, Opinion No. 697 will become effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." Issues raised by the interim plan will thus be mooted in the very near future, and the petitions should accordingly be dismissed when Opinion No. 697 becomes effective. *De Funis* v. *Odegaard*, — U.S. —, 42 U.S.L.W. 4578 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). If the permanent curtailment plan contains features which petitioners deem unsatisfactory, they may seek judicial review thereof pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

B. In Upholding the Commission's Interim Orders, the Court of Appeals Did Not Deviate From This Court's Decisions.

In upholding the Commission's action, the Court of Appeals did not deviate at all from the decisions of this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621; *Permian Basin Area Rate Cases*, 390 U.S. 747 (1969); or *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1955), concerning the Commission's obligations in curtailment proceedings or its duty to set asde contractual provisions inimical to the public interest. Neither does the Court of Appeals' decision create a conflict with another circuit, as some petitioners suggest. Accordingly, the several petitions should be denied.

In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court held that Sections 1(b) and 16

of the Natural Gas Act, 15 U.S.C. §§ 717(b) and 717o, conferred on the Commission broad authority to regulate service curtailments by pipelines subject to its jurisdiction. *Id.* at 638, 642. The substantive standard for evaluating curtailment programs, it was held, was Section 4(b), which provides:

> "(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

Also important to this case is Section 5(a) of the Act, which was invoked by El Paso's August, 1972, motion and provides in relevant part as follows:

> "(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: . . ."

The California petitioners do not seriously contend that the Commission erred in concluding that El Paso's existing curtailment procedures were unlawfully discriminatory.[2] Nor do they argue that the interim non-discriminatory pro rata curtailment procedures promulgated by the Commission are violative of Section 4(b). For neither of these positions would be supportable in fact or in law.

What the California petitioners do urge, however, is that the Commission went too far in remedying the undue discrimination embodied in El Paso's existing curtailment procedures. After assuring that gas service to EOC residential and commercial customers would be given the same priority as similar service in California, they say, the Commission should simply have let El Paso curtail industrial service in accordance with its existing procedures. Under El Paso's and the Commission's interpretation of those procedures,[3] all service to East of California direct industrials would have been curtailed for much of the 1972-

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[2] SoCal argues that the Commission's findings that there was a substantial likelihood that curtailment of EOC residential or commercial requirements would occur was not supported by the evidence. SoCal's position rests solely on El Paso's estimate of *average* day, rather than *peak* day, curtailments of EOC residential or commercial requirements. El Paso's evidence was that on extremely cold days, which might occur for four or five consecutive days, there would be curtailment of 226,000 Mcf of residential-commercial service. (R. 6698; 9561.) While the Court of Appeals noted that there was no certainty that this would result in curtailment of residential service, it affirmed, as supported by substantial evidence, the Commission's conclusion that residential and commercial service together would be curtailed on very cold days. (Slip Op. at 25-28.)

[3] But see note 1 *supra*.

73 winter (and undoubtedly to an even greater extent in the 1973-74 winter), while industrials served by EOC distributors would have fared only slightly better. (R. 9561.) At the same time, PG&E and SoCal would have received, day after day, one-hundred percent of their contract entitlement, much of which would have been sold to industrial users. In short, the California petitioners were advocating disparate treatment by El Paso which would have favored its California indirect industrial customers at the expense of its East of California direct customers.

The complete answer to the position asserted by the California petitioners is that the Commission had an obligation to prescribe a nondiscriminatory curtailment plan for El Paso, not merely one which eliminated only the most objectionable features of the existing plan, *i.e.,* potential curtailment of EOC residential and commercial service before El Paso's deliveries to PG&E and SoCal were cut by 1 Mcf.[4] Section 5(a), which the Court has held may be used to implement the Commission's curtailment authority, *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 643, provides that after the Commission finds an existing tariff provision unlawful, it "shall determine the *just and reasonable* . . . rule, regulation, practice, or contract to be thereafter observed and shall fix the same by order . . ." (Emphasis added.) And, of course, in prescribing the plan, the Commission had to observe

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[4] In addition to their grave concern regarding predicted curtailment of EOC residential-commercial service, the Commission and the Court of Appeals plainly considered the discriminatory, complete curtailment of gas deliveries to EOC industry to be a significant indication of the unlawfulness of El Paso's existing procedures. (48 F.P.C. at 934-35; Slip Op. at 28.)

the nondiscrimination requirements of Section 4(b). *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 642-43. In view of these governing criteria, it is readily apparent that the Commission did not act unlawfully in prescribing an end use curtailment plan which accorded similar treatment to all of El Paso's customers. Indeed, one wonders what other lawful order the Commission could have entered under the relevant statutory and case law.

The California petitioners' characterization of the Commission's action as (1) unjustifiably upsetting their contractual expectations of a firm gas supply and (2) unexpectedly shifting volumes of gas from industrial users in California to similar users in states East of California is simply inflammatory rhetoric which does not advance analysis of the issues. The EOC direct industrials, such as *ASARCO, et al.,* enjoy, under their contracts with El Paso, service which is no less firm than El Paso's gas service to PG&E and SoCal. The only difference is the not unusual provision, that being industrials, ASARCO, *et al.,* could be interrupted in emergency situations *to ensure continued service to the "domestic" customers served by El Paso's distributor customers.* (*E.g.* R. 10725-26, 10761-62, 10888-89, 10941-42). ASARCO, *et al.'s* contracts do *not* provide that service to them can be cut off permanently merely to ensure continued gas deliveries to PG&E and SoCal for redelivery to their large steam electric generating plant customers.

The hard fact is that the severe and worsening natural gas shortage currently affecting the United States as a whole and El Paso in particular has resulted in the frustration of the contractual expecta-

tions of all of El Paso's firm customers, whether located in California or in States to the East. Those customers, including ASARCO, *et al.*, had relied on a continuing adequate supply of gas from El Paso in making plans, commitments and capital investments. That El Paso's gas shortage has demonstrated that such reliance was unjustified is hardly a sufficient reason for adopting the California petitioners' suggestion that the entire burden of the shortage be borne by EOC customers.[5]

It was the Commission's unenviable task to devise in a short time interim procedures which would spread the shortfall between supply and demand in a nondiscriminatory and nonpreferential manner. In issuing its Orders designed to accomplish this goal, the Commission did not set aside the California petitioners' contractual expectations to any greater degree than it did those of the EOC customers and did not, as the California petitioners urge, shift volumes of gas from California to the East. Rather, the Commission simply ordered that El Paso's systemwide shortage be apportioned ratably among those served by that system, and, as a result, *all* customers are receiving *less* gas than they are contractually entitled to.

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[5] Even assuming the validity of El Paso's view of its existing procedures (although El Paso historically had not acted in accordance with that view), the procedures were not in conformity with the contract rights of ASARCO, *et al.* In any event, curtailment procedures historically utilized only during severe winter weather conditions when El Paso's pipeline capacity was insufficient to satisfy all of its customers' contract entitlements were hardly dispositive when the Commission undertook to devise procedures for dealing with severe daily curtailments resulting from a chronic gas supply shortage.

In view of the foregoing, it is plain that the Commission did not deal any differently with the California petitioners' contract rights than it did with those of, for instance, ASARCO, *et al.* In any event, the Commission certainly has the inherent authority to set aside, in connection with the exercise of its curtailment authority, contractual provisions subject to its jurisdiction which it finds are not in the public interest. *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 646; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* 350 U.S. at 344; *Permian Basin Area Rate Cases, supra,* 390 U.S. at 784. Utilizing these standards, it was entirely appropriate for the Commission to set aside the contracts between El Paso and PG&E and SoCal to whatever extent they may have provided that gas would be delivered to PG&E and SoCal for resale to industrial consumers while deliveries to the firm EOC industrials were being curtailed. Such an arrangement, which would result in gross discrimination between deliveries by El Paso for industrial gas consumers in California and States East of California, is clearly contrary to the public interest, especially in a time of acute gas shortage like that currently being experienced by El Paso's Southern Division System. In sum, one group of a pipeline's customers cannot be heard to invoke certainty of contract as a vehicle for preserving its own contract rights at the expense of those of another similarly situated group of customers.

C. The Court of Appeals' Decision Is Not in Conflict with International Paper Company v. Federal Power Commission.

The decision of the Court of Appeals is not in conflict with that of the Court of Appeals for the Fifth Circuit in *International Paper Co.* v. *FPC,* 476 F.2d

121 (5th Cir. 1973). In that case, the court accepted as settled that a valid Commission curtailment order would, in and of itself, override and limit pro tanto the pipeline's contractual obligation to deliver so many cubic feet of gas per day. 476 F.2d at 123. Indeed, an impossible situation would result if this effect were not given Commission curtailment orders.

The Fifth Circuit then considered whether such an order would also automatically insulate the pipeline from all potential damage liability, either for failure to deliver the agreed upon quantities, or under substitute fuel clauses. It was only in connection with these latter issues, which were not raised in the proceedings below, that the Fifth Circuit required the specific findings which some petitioners suggest the Commission was required to make in this case.

Both the Fifth Circuit[6] and the D.C. Circuit[7] recognized the difference between the curtailment and damages issues, and the D.C. Circuit properly concluded that the Commission had not acted contrary to the *International Paper* decision.

In any event, the Commission has plainly made any findings arguably required by *International Paper*. The Commission found, based on substantial evidence, that El Paso's existing curtailment plan was unduly discriminatory (the converse of preferential) and that the curtailments required thereby (*i.e.*, cessation of *all* natural gas service East of California before 1 Mcf of curtailment to PG&E or SoCal) made abrogation

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[6] 476 F. 2d at 126-29.

[7] Slip Op. at 20-21.

of that plan necessary in the public interest. For these reasons, the decision below has created no conflict between circuits.

D. In the Circumstances Facing It, the Commission Was Not Required To Issue an Environmental Impact Statement.

Review should not be granted merely because the Court of Appeals upheld the Commission's decision to promulgate interim curtailment procedures without first issuing an Environmental Impact Statement or stating why it was impractical to do so. While ASARCO, *et al.*, believe that the National Environmental Policy Act, 42 U.S. § 4321 *et seq.*, requires the Commission to issue such a statement or explanation in conjunction with a *permanent* curtailment plan, the circumstances underlying the issuance of the *interim* plan—the need for expeditious action to ensure that anticipated service curtailments would be administered in a just and reasonable manner—simply precluded the Commission from considering the environmental issue beyond providing for an exemption from curtailment in environmental emergencies. A system shortage was about to materialize and the Commission could have done nothing to stave it off while it considered environmental matters. In these circumstances, the Court of Appeals properly concluded that the Commission was temporarily excused from complying with NEPA, which requires that, "to the fullest extent *possible*," [8] impact statements will be issued. *See also Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142, 150 (5th Cir. 1973).

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[8] 42 U.S.C. § 4332(2)(c) (emphasis added).

CONCLUSION

For the foregoing reasons, the several petitions for writs of certiorari should be denied.

Respectfully submitted,

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June, 1974

SUPREME COURT, U. S.

FILED

JUL 23 1974

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73–1772, 73–1776, 73–1790, 73–1825

SOUTHERN CALIFORNIA GAS COMPANY,
PACIFIC GAS AND ELECTRIC COMPANY,
SAN DIEGO GAS AND ELECTRIC COMPANY,
CITY OF WILLCOX, *et al.*,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN UNION GAS COMPANY, SOUTHWEST GAS CORPORATION AND TUCSON GAS & ELECTRIC COMPANY

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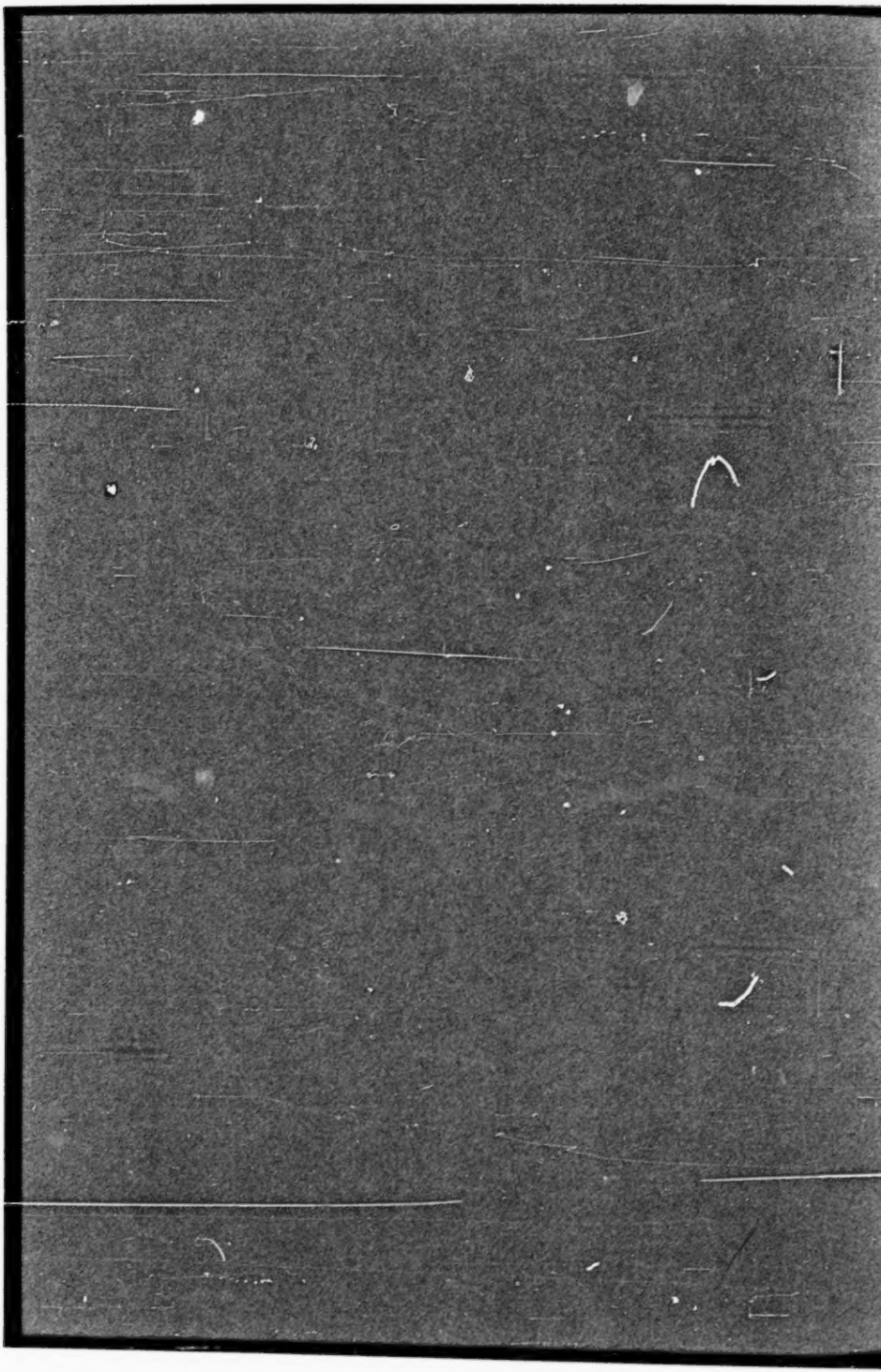

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73–1772, 73–1776, 73–1790, 73–1825

SOUTHERN CALIFORNIA GAS COMPANY,
PACIFIC GAS AND ELECTRIC COMPANY,
SAN DIEGO GAS AND ELECTRIC COMPANY,
CITY OF WILLCOX, *et al.*,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN UNION GAS COMPANY, SOUTHWEST GAS CORPORATION AND TUCSON GAS & ELECTRIC COMPANY

Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas & Electric Company, respondents herein and intervenors in the court below, oppose the captioned petitions for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on January 21, 1974, in the matter styled ***American Smelting and Refining Company, et al. v. Federal Power Commission.***

QUESTIONS PRESENTED

1. Whether the issues raised by interim emergency orders of the Federal Power Commission are moot by reason of the issuance of permanent orders superseding such?

2. Whether the Federal Power Commission's mandate under Sections 4(b) and 5(a) of the Natural Gas Act to proscribe undue discrimination in the curtailment of natural gas service is limited to protecting residential and commercial needs from preferential practices, or whether such obligation to insure non-discriminatory practices covers industrial needs as well?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 USCA, §717, *et seq.* are Sections 4(b) and 5(a) which provide:

Section 4

* * * * * * *

"(b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 USCA §717c(b)

Section 5

* * * * * * *

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas

distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: ***Provided, however***, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 USCA §717d(a)

STATEMENT

The instant matter involves orders of the Federal Power Commission (Commission) establishing interim emergency priorities and procedures to ration natural gas supplies on the Southern Division System of El Paso Natural Gas Company (El Paso), an interstate pipeline subject to the Commission's jurisdiction under the Natural Gas Act, ***supra***, pending the Commission's final decision upon the appropriate permanent prescription to govern curtailment of service. The controversy here involved concerns whether the Commission properly found that all customers served by El Paso should be curtailed in the same manner, or whether certain claimed contractual preferences should prevail.

Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas &

Electric Company are natural gas distributors serving approximately 668,000 consumers throughout the so-called east-of-California region, consisting of west Texas, New Mexico, Arizona, and southern Nevada. El Paso's deliveries to the above-listed distributors pursuant to firm contracts constitute the sole source of natural gas available for resale to such consumers, except for certain quantities purchased by Southern Union Gas Company from other suppliers. In addition to such distributors' dependence upon El Paso for their resale requirements, Arizona Public Service Company and Tucson Gas & Electric Company are dependent upon El Paso's firm direct sale deliveries as their sole source of natural gas for their electric generation facilities, which provide electric energy to some 432,000 consumers.

The cast-of-California region, presently consisting of 30 resale distributor customers and 21 direct sale industrials served by El Paso, has received firm service for over four decades. Such service commenced in the early 1930's as El Paso extended its pipeline facilities westward from the natural gas production areas in west Texas through southern New Mexico and Arizona to a point of termination near Phoenix, Arizona (R. 22).

The east-of-California region's dependence upon El Paso's deliveries has developed as a result of both the geology native to the region and El Paso's particular marketing practices. First, the major portion of the east-of-California market served from El Paso's system contains no significant hydrocarbon formations for use either as a source of supply or as storage for volumes to be later withdrawn for peak period needs (R. 1905). Second, by reason of El Paso's early marketing practice, all large-volume industrial requirements in the east-of-California region were served solely on a direct sale basis (R. 1705-1706), with the local distributors thus left to serve residential and small commercial users. As a result, contrary to normal distribution operations wherein a distributor purchases approximately the same quantity from its supplier each day and meets the varying demands of its

temperature-sensitive residential and commercial requirements by interrupting service to its industrial users or withdrawing volumes from underground storage, the east-of-California distributors' purchases necessarily vary with the weather. In recognition of these patterns of service, El Paso has rendered firm service to the east-of-California distributors pursuant to contracts which provide for the satisfaction of their full requirements and do not require a minimum annual level of purchases.

More than 15 years after the above-described service to the region east-of-California was initiated, El Paso extended service to the state of California. Such service, commencing in 1947 to petitioner Southern California Gas Company, which in turn sells to petitioner San Diego Gas and Electric Company, and in 1950 to petitioner Pacific Gas and Electric Company, follows a pattern wholly different than that rendered to the east-of-California region. The two California companies desired that a fixed volume of gas be delivered each day of the year since, unlike the necessarily weather-dependent demands of the east-of-California distributors, the varying demands of their temperature-sensitive residential and commercial users could be met by (1) interrupting service to the large industrial loads in their distribution territories, (2) withdrawing gas stored in large underground reservoirs, and (3) increasing takes from their other sources of supply (R. 22-23; 1763-1764; 7065-7066).

Since the California distributors now purchase approximately 80% of El Paso's annual sales volumes, the extension of service to the California distributors necessarily involved a many-fold expansion of El Paso's previously-existing transmission facilities. The Financial feasibility of such mammoth expansion rested upon the California distributors' representation that they would purchase at approximately 100% of their maximum daily contract entitlement. Hence, the contracts and rate schedules executed for such service provided for (1) a penalty, in the form of a minimum annual bill, to insure that, if such purchases dropped below 91% of contract entitle-

ment, El Paso would nonetheless recover its costs and (2) a rate incentive, in the form of a discount constructed such that each unit above 91% of contract entitlement cost successively less than the preceding unit, to encourage such distributors to purchase 100% of contract entitlement. Pursuant to such rate form, the California distributors have paid a lower unit rate, despite the greater transmission mileage involved, than many of the east-of-California customers.

While the firm service rendered to the two regions was thus vastly different, El Paso's then-existing tariff provisions governing curtailment of service, although disputed by the California petitioners, properly provided for a ***pro rata*** apportionment of any and all curtailment to both California and east-of-California requirements. As specifically referenced in El Paso's Rate Schedule G under which the California companies receive service, Section 11.2 of El Paso's then-existing tariff provided that El Paso's sales to the two California distributors would be curtailed on the same end-use basis as all other deliveries (R. 9781; 12687-12690).[1]

While El Paso's then-existing tariff provided for the ***pro rata*** curtailment of both regions, such tariff purported to distinguish El Paso's liability for curtailing the east-of-California customers' firm contractual demands from that liability accruing from the curtailment of the California distributors. With respect to curtailments occasioned by depletion of supply, Section 9A thereof purported to exempt El Paso from liability to the east-of-California customers, while Section 9B provided that El Paso would not be so exempted from liability as respects the California distributors (R. 9778-9779).

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[1]Section 11.2 states that "in the sale and distribution of natural gas in the States of Arizona, New Mexico, Texas and San Juan County, Utah, . . .", certain procedures govern curtailment (R. 9781). El Paso's sales to the California customers are made in Arizona, and, hence, are covered by Section 11.2's terms. Similarly, Southwest Gas Corporation's distribution operations in Nevada fall within Section 11.2, since El Paso's sales to such company are effected within Arizona.

Except on infrequent occasions during the nearly four decades on full requirements service rendered to the east-of-California region and the 25 years of service to the state of California, El Paso never had the need to utilize the curtailment provisions of such tariff, nor was there any inquiry as to the justness and reasonableness of either the tariff's curtailment provisions or El Paso's interpretation thereof (R. 27). Until 1972, El Paso did not curtail any of its distributor customers, except for isolated ***force majeure*** instances ***Ibid.*** On infrequent occasions of extreme peak demand during such period when El Paso's supplies were not sufficient to satisfy all of its customers' requirements, El Paso did not follow the plain reading of its then-existing tariff providing for the ***pro rata*** curtailment of the industrial requirements served by all of its customers. Instead, evidently mindful that the east-of-California distributors served virtually no industrial loads and equally mindful of the liability that would be incurred if the California distributors were curtailed, El Paso levied such minor curtailments solely upon its direct sale customers (R. 28). The direct industrial customers assumed that curtailment was being implemented on a ***pro rata*** basis to the industrial loads served by distributors, as well, on such occasions, and, hence did not question whether such infrequent, small-volume curtailments were implemented in accordance with the relevant contract and tariff provisions (R. 1444-1445).

In 1971, El Paso's supply projections indicated that the first prolonged and substantial curtailments to be experienced by its system would commence on November 1, 1973, and continue on a daily basis thereafter (R. 28). Consistent with the Commission's Order No. 431,[2] El Paso filed proposed

[2] "In April 1971 the Federal Power Commission (FPC) promulgated its Order 431 requiring every jurisdictional pipeline to report to FPC whether curtailment of its deliveries to customers would be necessary because of inadequate supply of natural gas. A pipeline anticipating the necessity for curtailment was required to file a revised tariff to control deliveries to all customers – industrial 'direct sales' customers, purchasing gas for their own consumption, and 'resale' customers, purchasing gas for distribution to ultimate consumers." ***Federal Power Commission*** v. ***Louisiana Power & Light Co., infra,*** at 406 US 621, 623.

tariff modifications on July 6, 1971, incorporating new curtailment provisions to cope with such supply deficiencies (R. 11406). In support of its proposed tariff revisions, El Paso alleged that under its interpretation of the then-existing tariff provisions – an interpretation apparently fully cognizant of its liability under such tariff for failure to deliver to the California distributors – that the east-of-California customers alone would bear the full burden of the first substantial curtailment to be experienced on its system, and its proposed modifications would eliminate such disastrously discriminatory result.

On August 17, 1972, after the conclusion of lengthy hearings before an administrative law judge on the proposed tariff revisions, but prior to the issuance of an initial decision by the judge, El Paso informed the Commission that its latest supply forecasts revealed that curtailments in the magnitude of 250,000 Mcf on the average day would commence by November 1972, rather than November 1973, as originally projected (R. 11940). Moreover, El Paso informed the Commission that it was unwilling to incur the risk of liability which might flow from implementing, prior to a Commission determination as to the justness and reasonableness of such, either (1) its proposed tariff revisions or (2) its interpretation of the curtailment provisions of its then-existing tariff (R. 11933-11938). Accordingly, El Paso requested that the Commission exercise its emergency authority under Section 5(a) of the Natural Gas Act to provide interim procedures to govern the administration of curtailment pending decision upon the appropriate permanent program (R. 1938-1944).

On October 31, 1972, the Commission issued its Opinion No. 634 (R. 13355-13368). Such opinion found that El Paso's interpretation of its then-existing tariff provisions, which placed all of such curtailment on the east-of-California customers, was an obvious violation of the basic protection against discrimination afforded by the Natural Gas Act (R. 13362). Faced with the impending onslaught of curtailment, the Commission prescribed interim emergency priorities and procedures providing for the ratable curtailment of all service

rendered by El Paso according to an order of end-use priorities. Pursuant to such order, all large boiler fuel end-use requirements with alternate fuel facilities were to be curtailed first, thereafter small boiler fuel requirements and other industrial requirements were to be curtailed as necessary, with small commercial and residential requirements the last to be reached by curtailment (R. 13367).

After the Commission denied rehearing of such decision (R. 13747-13754), the California distributors and other parties initiated review proceedings in the U.S. Court of Appeals for the District of Columbia Circuit. The California petitioners' principal contention was that the Commission's jurisdiction over curtailment during the interim period was limited to insuring adequate service to the east-of-California residential and commercial users, but that such curtailment jurisdiction did not extend to correcting the discrimination between the two region's industrial users.

While remanding certain aspects of the interim emergency orders, the Court of Appeals upheld the Commission's determination that El Paso's interpretation of its then-existing tariff provisions would result in gross discrimination against end-users in the east-of-California region, and that, to the extent that such interpretation was properly based on El Paso's then-existing tariff and contracts, the Commission may override such contractual provisions with a plan based upon the ratable curtailment of all end-uses.

REASONS FOR DENYING THE WRITS

As shown below, the reasons for denying the writs are twofold: (1) the issues raised by the petitioners are, or will be shortly, moot, and (2) the decision below is clearly correct.

I

THE ISSUES RAISED ARE MOOT

On June 14, 1974, the Commission issued its Opinion No. 697 prescribing permanent curtailment priorities and procedures to supersede the interim emergency orders involved herein, to be effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." (Mimeo, p. 35). Assuming that the issues raised by the petitioners are worthy of this Court's attention, such issues should be assessed in the context of the Commission's fully considered decision as to the appropriate permanent curtailment procedures, rather than on the basis of stop-gap interim emergency orders which have been, or shortly will be, superseded. The petitions, therefore, should be denied.

II

THE DECISION BELOW IS CLEARLY CORRECT

The decision below represents a straightforward application of this Court's holding in ***Federal Power Commission v. Louisiana Power & Light Company***, 406 U.S. 621 (1972). ***LP&L*** found that the Commission has comprehensive and all-pervasive authority under its Section 1(b) transportation jurisdiction to fully regulate the conduct of curtailment of interstate natural gas service. This Court found, further, that such plenary authority to prescribe uniform curtailment priorities and procedures is not fettered by contractual curtailment provisions negotiated by private parties, but is exercised according to public interest standards, 406 U.S. 621, 642-643:

> "The substantive standard governing FPC evaluation of curtailment plans is found in § 4(b) of the Act:

> 'No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.' 15 USC §717c."

LP&L further found that the substantially similar provisions of Section 5(a), under which the instant controversy arises, provides a second procedural mechanism to enforce the Natural Gas Act's sanctions against preference, ***Ibid.*** Thus constituted, "[t]he Natural Gas Act of 1938 granted FPC broad powers 'to protect consumers against exploitation at the hands of natural gas companies.' "

The controversy involved herein provides a classic demonstration of why Sections 4(b) and 5(a) provide the standard for curtailments rather than agreements between private parties. By conferring on El Paso's interpretation of its previously-existing tariffs the status of express contract provisions, the California distributors contend that they have obtained from El Paso a "contract right" to exemption from curtailment, while the east-of-California purchasers have not obtained such "contract right". The California petitioners concede, however, that to exempt all service to California from curtailment while curtailing residential and commercial requirements east-of-California would be grossly discriminatory. But such California distributors see no discrimination in an allegedly contract-based curtailment program which would curtail ***all*** industries dependent upon natural gas in the east-of-California region prior to curtailing ***any*** industrial service rendered to the California distributors. Thus, although El Paso commenced full requirements service to the east-of-California region some 15 years before commencing service to California, two of the largest utilities

in the United States are here seriously suggesting that their private party agreements purchased an exemption from curtailment, thereby demoting the antecedent full requirements service to the east-of-California region to a curtailment status subservient to their own. No greater example could be found of the economic bludgeoning that the public interest provisions of Sections 4(b) and 5(a) were designed to prevent.

The short answer to the California petitioners' claim of preference is that Sections 4(b) and 5(a) prohibit preferential or discriminatory practices irrespective of whether the service involved is for residential, commercial, or industrial purposes. There is nothing within the plain terms of such Sections, the legislative history thereof, or this Court's holding in ***LP&L*** to suggest that the Commission's mandate "to protect consumers against exploitation" does not apply equally to all classes of service. See ***Granite City Steel Co.*** v. ***Federal Power Commission***, 320 F.2d 711 (1963).

In recognition, perhaps, that the sanctions against undue preference or discrimination apply equally to service rendered to industrial requirements, the California petitioners assert that, if discriminatory, their claimed contractual right of exemption is not unduly so. In support of such contention, the California distributors point to the provisions for a minimum annual bill and for a rate incentive in the rate schedule under which El Paso renders their service, and assert that such provisions are obligations not assumed by the east-of-California parties. Such "obligations", however, do not justify exemption from curtailment. The minimum annual bill is a provision commonly assumed by virtually all interstate pipelines' major customers in order to assure the financibility of major expansions of facilities. Since the financial feasibility of the enormous expansion of El Paso's system was based on the assumption that the two new customers would purchase 80% of such dramatically expanded annual throughput, it is hardly unreasonable that a condition for financing such

expansion would include the assumption of a minimum annual bill by such distributors. As for the rate incentive, such "obligation" has historically enabled the California distributors to purchase from El Paso at a lower unit price than that paid by distributors in Arizona. Hence, neither of such items can be seriously claimed as burdensome obligations, much less as justification for the extraordinary preference claimed.

In sum, the decision below properly upheld the Commission's determination that all customers served by El Paso had the expectation of firm service, and that the consequence of the failure of El Paso's supplies must be apportioned ratably to the end-use requirements served by all customers of El Paso. Since such decision is based on the plain terms of the Natural Gas Act and this Court's interpretation thereof, the decision below is clearly correct.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3]Petitioners, Pacific Gas and Electric Company and San Diego Gas and Electric Company, raise subsidiary issues relating to (1) a claimed conflict between the decision below and the Fifth Circuit's decision in *International Paper Company* v. *Federal Power Commission*, 476 F.2d 121 (1973), and (2) a claimed violation of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.* In both instances, the Court below fully discussed and properly dismissed such arguments as make-weight.

First, there clearly exists no conflict between the decision below and the Fifth Circuit's decision in *International Paper*, as is set forth in detail in the decision below (Appendix A to the petition of Pacific Gas and Electric Company, pp. 18-19). The Fifth Circuit expressly acknowledged the Commission's plenary authority to override contractually based curtailment provisions upon a showing that such

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provisions were discriminatory. What *International Paper* did contest was a matter falling outside of the Commission's curtailment jurisdiction; i.e., "whether or not an FPC curtailment order alone will serve to insulate a pipeline unable to meet contractual commitments from liability for this failure." 476 F.2d 121, 123. It was solely with respect to " '*damages* in the public interest', not '*curtailment* in the public interest' " that the Fifth Circuit held a finding of unequivocal public necessity to be a prerequisite for the abrogation of contractual provisions. 476 F.2d 121, 129, (emphasis in original).

Second, with respect to the claimed violation of NEPA, the decision below correctly found that the Commission's obligation to comply "to the fullest extent possible" with NEPA's procedural obligations, means compliance unless such compliance would give rise to a violation of the Commission's statutory obligations (Appendix A to the petition of Pacific Gas and Electric Company, pp. 47-48). In

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this instance, the Court below properly held that the Commission, in the very compressed time span between hearing and decision, had a clear statutory duty to take effective interim action to prevent gross discrimination among customers. Hence, such statutory conflict properly excused compliance with NEPA's procedural requirements until the issuance of the permanent plan. (See: ***Atlantic Gas Light Company*** v. ***FPC***, 476 F.2d 142 (5th Cir. 1973).

In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1772, 73-1776, 73-1790, 73-1825

SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Petitioners[1] challenge the validity of orders of the Federal Power Commission (Pet. App. 54-69)[2] es-

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[1] The petitions in Nos. 73-1790 and 73-1825 were filed out of time. The judgment of the court of appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The time within which to file a petition for a writ of certiorari expired on May 26, 1974, and no extensions were granted. (May 26 was a Sunday, and May 27 was a legal holiday.) The petition in No. 73-1790 was filed on May 29, 1974, and the petition in No. 73-1825 was filed on June 3, 1974. This Court therefore lacks jurisdiction over those petitions (28 U.S.C. 2101(c)). We accordingly address ourselves in this response only to the contentions of the petitioners in Nos. 73-1772 and 73-1776.

[2] "Pet. App." refers to the appendix to the petition of Southern California Gas Company, No. 73-1772.

tablishing an interim plan, pending further proceedings to establish a permanent plan, for the curtailment of natural gas deliveries, during periods of shortage, to customers of El Paso Natural Gas Company, a large interstate pipeline. The court of appeals, in an opinion that fully and accurately states the facts and background of the case, affirmed the orders in part but remanded the case to the Commission for further consideration with respect to several matters (Pet. App. 1-53). The interim plan has thus not yet been finally approved by the court of appeals. The plan will, in any event, soon be superseded by the permanent plan, which was prescribed by the Commission on June 14, 1974.[3]

The Commision's interim plan established a schedule of priorities for allocating gas supplies when El Paso's deliveries must be curtailed. Those priorities were defined in terms of the "end use" of the gas to be delivered—*i.e.*, whether the gas was destined for residential, commercial, or industrial consumption. Petitioners Southern California Gas Company (SoCal) and Pacific Gas and Electric Company (PG & E), both California distributor-customers of El

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[3] The Commission's opinion and order prescribing a permanent curtailment plan are set forth in the appendix to Southern California's reply brief (No. 73-1772), pp. 1-54. The permanent plan will take effect, according to the terms of the order, upon the issuance of a final order on the petitions for rehearing presently pending before the Commission (*id.* at 43).

The opinion on the permanent plan also constitutes the Commission's opinion on remand with respect to the interim plan (*id.* at 8-9).

Paso, contend that the interim plan unjustifiably interfered with their contractual rights to purchase gas from El Paso and improperly "shifted" gas supplies from one group of customers to another.

This Court rejected similar contentions in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621. The Court held in that case that the Commission "may order pipelines facing shortages to develop and submit rational curtailment arrangements" and may permit "the pipeline's tariff amendments to take effect despite contrary terms in existing contracts" (406 U.S. at 646). The Court also made clear that "the Commission would have emergency authority to issue interim orders effecting a curtailment plan" (*id.* at 644, n. 18).

Contrary to petitioners' assertions, nothing in the Court's opinion suggests that the Commission's emergency authority to prescribe a curtailment plan is limited to providing for "the demands of human-needs customers" (SoCal Pet. 11). Where the Commission finds that a pipeline's existing tariffs are discriminatory, it is obliged to prescribe just and reasonable tariffs to eliminate *all* aspects of the discrimination. The Commission here found that, under El Paso's existing tariffs, service to all of its residential, commercial, *and* industrial customers located east of California would be curtailed before *any* service to California customers would be curtailed. It accordingly found the plan to be "discriminatory and violative of Section 4(b) of the Natural Gas Act" (Pet. App. 60).

In eliminating that discrimination, the Commission reasonably concluded that, in a time of severe natural gas shortage, the contractual expectations of *all* users are necessarily frustrated and that the resulting burden should be spread as equitably as possible (see Pet. App. 17-18). An "end use" plan which fairly allocates the available supply among the ultimate users of the gas is not invalid merely because one or another distributor receives less gas than its contract with the pipeline might call for in a period of relatively plentiful supply. As the court of appeals correctly stated, "the Commission is not bound by agreements among parties subject to its jurisdiction" (*id.* at 18) where the result would be unduly discriminatory.

Petitioner PG & E, relying on the decision in *International Paper Co.* v. *Federal Power Commission*, 476 F. 2d 121 (C.A. 5), argues (Pet. 10-12) that the Commission failed to make essential threshold findings to justify its conclusions that allocating gas in accordance with existing tariffs would be unduly discriminatory and that requiring the pipeline to allocate gas without regard to contractual preferences would be in the public interest. As the court of appeals correctly stated, however, *International Paper* is inapposite.

> [T]he twin findings mentioned in the *International Paper* opinion are only required for the purpose of exonerating a pipe line from liability for breaches of contract which may result from compliance with Commission orders. The peti-

> tions now before us do not concern the remedial rights of the pipe line and its customers *inter sese*, but the authority of the Commission to override a contractually arranged curtailment plan. On the latter question, the statute leaves no doubt. The only preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634. [Pet. App. 20; footnote omitted.]

Petitioner SoCal also claims that "[t]he Commission had no substantial evidence upon which it could conclude that there was any real danger to the residential and commercial customers east of California" (Pet. 17). The court of appeals found, however, that "the Commission's prediction of severe [east-of-California] curtailments under the former plan is supported by substantial evidence" (Pet. App. 28) and that "the evidence does sustain the conclusion that peak day curtailment would, at minimum, cause the complete shutdown of [east-of-California] direct industrials and substantial reduction of service to [east-of-California] commercial customers while California service remained undisturbed" (*id.* at 29).[4] Petitioner has not shown that the court of

[4] At the same time, the court found that the record did not support a finding that east-of-California *residential* customers would have suffered curtailment under the former plan. It accordingly authorized the Commission on remand "to modify its orders accordingly, subject to further review by this Court" (Pet. App. 29). We assume, therefore, that petitioner PG & E's present claim relates only to the Commission's findings concerning commercial customers.

appeals "misapprehended or grossly misapplied" the substantial evidence standard. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491; *Mobil Oil Corp.* v. *Federal Power Commission*, No. 73-437, decided June 10, 1974, slip op. 23.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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